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Docket OST-97-3285

DATED: April 2, 1998

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

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Joint Application of	)	
	)	
<b>AMERICAN AIRLINES, INC.</b>	)	
and	)	Docket OST-97-3285
<b>LINEA AEREA NACIONAL CHILE,</b>	)	
<b>S.A. (LAN CHILE)</b>	)	
	)	
under 49 U.S.C. 41308 and 41309 for	)	
approval of and antitrust immunity	)	
for alliance agreement	)	
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DATED: April 2, 1998

**REPLY OF UNITED AIR LINES, INC.**  
**AND MOTION FOR LEAVE TO FILE**

Pursuant to Order 98-2-21, four parties -- United Airlines, Continental Airlines, Delta Airlines and the Regional Business Partnership (Newark) -- filed comments in this proceeding demonstrating beyond serious dispute that the proposed alliance between American Airlines and Lan Chile is extraordinarily anti-competitive and adverse to the public interest? In a Joint Response to those comments, American and Lan Chile do not even seriously attempt to refute the case made against their alliance. Rather, having no facts with which to defend their

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<sup>1/</sup> A fifth party, Aerovias de Mexico, filed an answer supporting the positions taken by United, Continental and Delta.

alliance, American and Lan Chile are left with no response other than to impugn the motives of their adversaries and to invoke lofty rhetoric about the theoretical benefits of open skies agreements in general. They also cite the benefits consumers have gained from other alliances that have received antitrust immunity from the Department under vastly different market conditions from those that prevail in the U.S.-Chile and broader U.S.-Latin America air travel markets. In order to assure that the record before the Department is complete and accurate, and to respond to the false comparisons and phony rhetoric on which American and Lan Chile base their case for immunity from U.S. antitrust laws, United requests leave to file this response to the Joint Reply filed by American and Lan Chile in this docket.

1. United, Continental, Delta and the Newark parties have demonstrated beyond peradventure that the proposed alliance between American and Lan Chile provides no meaningful benefits to consumers. Nor will the alliance result in American extending what is already the most extensive U.S.-Latin America online route network into significant new markets the carrier does not already serve with its own equipment. On the contrary, the record before the Department persuasively shows, and American does not deny, that its proposed alliance with Lan Chile is an integral part of American's plan to perpetuate its

dominance of key U.S. -Latin America air travel markets. American hopes to accomplish this by preempting alliances between Latin American carriers and American's U.S. competitors that could compete with American's established U.S.-Latin America online network and ensure meaningful network-to-network competition throughout the region.

Unable to provide any meaningful response to the comments that have been filed, American and Lan Chile instead urge the Department simply to ignore the fact that their alliance is utterly devoid of public benefits because the opposition to their alliance "amount[s] to a manifesto for selective government intervention into the free market process." Joint Reply at 2. Nothing could be further from the truth.

It is the joint applicants, not the parties commenting on their application, who are seeking "government intervention into the free market process." Immunity from U.S. antitrust laws, which the Supreme Court has called the "Magna Carta of free enterprise/ United States v. Topco Associates, Inc., 405 U.S. 596 (1972) at 611, is a non-market based benefit the Department is authorized under the statute to extend carriers where the pro-competitive advantages of an agreement clearly outweigh its potential anti-competitive consequences. It is not a benefit carriers are entitled to as a matter of right simply because

they find it commercially advantageous to enter into an alliance agreement.

Before the Department can grant such relief under the terms of Section 41309 of the statute, it must be able to find, based on the record before it, that the grant of such immunity would be consistent with the public interest and would not substantially reduce competition. Alternatively, in cases such as this, where competition will be reduced, immunity can be granted only if the Department is able to find that the reduction in competition that would result from such immunity would be off-set by other serious transportation needs or important public benefits that cannot be achieved by reasonably available alternatives that are materially less anti-competitive. American and Lan Chile cannot demonstrate that granting their joint application would be consistent with the statutory predicates for such action simply by railing against the motives of the parties which filed comments on their application, or by whining about government intervention in the marketplace, especially when the very relief they are seeking is itself a quintessential form of government intervention in the free market.

Nor can American and Lan Chile demonstrate that granting their application would be consistent with the statute by citing

the Department's approval and antitrust immunity granted to other alliance agreements. The Department has already established that each alliance agreement must be evaluated on its own individual merits, and the fact that one alliance agreement has been approved and granted antitrust immunity provides no precedent for approval of another alliance agreement. See Order 96-H-12 (The Department examines each proposed alliance agreement on its individual merits based on the particular facts and circumstances presented.) As such, the repeated references by American and Lan Chile to the number of alliances to which United, Continental and Delta may be parties is simply of no avail to them in the calculus the Department must perform to determine whether their proposed alliance can be approved and granted antitrust immunity under the statutory standards set forth in Section 41309.

Under that Section, it is the applicants which bear the burden of proving that their alliance meets a serious transportation need or secures an important public benefit, a burden they have simply failed to meet. And, American and Lan Chile cannot meet that burden merely by incanting the fact that other carriers have been granted immunity from the antitrust laws for similar alliances in other markets where competitive conditions are different.

The record before the Department amply demonstrates that the differences in market structure between U.S.-Europe and U.S.-Latin America air travel markets are so substantial that it would be a serious mistake for the Department to presume that the strategy it has pursued in Europe to open the transatlantic market to increased competition can be replicated in Latin America without serious anti-competitive consequences.

Despite these obvious differences, American and Lan Chile continue to argue that approval of their alliance could serve as a "critical beachhead" to secure open skies agreements throughout South America. Joint Reply at 2-3. The fact is, however, that the Department could successfully use its pioneering open skies agreement with the Netherlands in 1992, coupled with the grant of anti-trust immunity to the Northwest/KLM strategic alliance, as an inducement to open other European markets to entry by all U.S. carriers without risking a substantial lessening of competition in any U.S.-Europe air travel market.

A similar strategy in Latin America, on the other hand, is likely to have far different long run consequences and risk a serious lessening of competition throughout the region because of American's dominant position in the market. As United pointed out in its initial comments in this docket, if the

Department approves the American/Lan Chile alliance despite its obvious anti-competitive consequences in a Faustian bargain to obtain open skies, it will send a clear signal to other carriers and governments throughout Latin America to pursue a similar strategy: Offer the U.S. open skies, but conditioned on approval of an antitrust immunized alliance between American and their national carrier. See United Comments at 15-18.

Under these circumstances, the supposed consumer and competition benefits that would become available from securing open skies agreements would be wholly illusory. Rather than create opportunities for increased entry and competition throughout Latin America for other U.S. carries, open skies would become simply the vehicle for American to secure antitrust immunized alliances with its key foreign-flag competitors throughout the region, foreclosing the opportunity for other U.S. carriers to utilize alliances and code sharing with these carriers to increase network-to-network competition with American.

2. American and Lan Chile also argue that the Department should ignore the obvious parallels between the American/Lan Chile alliance and the American/TACA alliance, which the Department of Justice ("DOJ") has cautioned is likely to lead to a substantial lessening of competition in U.S.-Central America



markets if approved by the Department. American and Lan Chile would have the Department ignore these parallels, not because the market situations are in fact inapposite, but because "American and Lan Chile are not aware of any proceeding in which the Department has assumed to know what a non-party might have said, had it chosen to file an answer...-" Joint Reply at 19.

The pertinent question, however, is not what the Department should assume, but what the record here shows. United, Continental and Delta have all firmly documented that the factual predicates that led DOJ to express serious concerns about the anti-competitive consequences of approving the American/TACA alliance are equally applicable here. The fact that American and Lan Chile do not even attempt to show that these parallels do not exist only serves to confirm the validity of the comparison.

The Department does not need to assume what position DOJ may ultimately take in this proceeding. All it needs to do is to review the pleading DOJ filed in the TACA proceeding and determine for itself whether the concerns DOJ expressed there are not equally applicable here. The fact that American and Lan Chile are apparently unable to refute DOJ's concerns on the merits, or to show that such concerns are inapplicable to their

alliance, speaks volumes as to the conclusion the Department should draw.

3. Lan-Chile argues that it must form its alliance with American because only that carrier has a hub at Miami. Joint Reply at 12-13. Both carriers claim that American's 'connecting network at Miami' is the predicate for Lan Chile's selection of American because of Lan Chile's need for access to traffic flows at Miami to other U.S. markets. Id. at 15-16. Lan Chile goes on to explain that both Continental and Delta serve Miami only from their hubs and do not offer sufficient connections to other U.S. points to meet Lan Chile's needs. Id. at 12, 22.

Significantly, Lan Chile does not make a similar claim with respect to United, as, indeed, it cannot. United, unlike Continental and Delta, offers nonstop service between Santiago and Miami, which is the largest U.S. market for Chile traffic, accounting for over 50 percent of total demand? Although United does not operate a hub at Miami, and could not do so given American's virtually impregnable position at that airport, it does maintain an international connecting complex at that point

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<sup>2/</sup> UA Comments, dated March 13, 1998, in this docket, Exhibit UA-5.

to help support its U.S.-South America services.<sup>3/</sup> Indeed, United offers nonstop service from Miami to nine U.S. points, which produce over half of the U.S. traffic to Chile that originates outside of Miami, and online connections to virtually every other U.S. point that accounts for a meaningful number of U.S.-Chile passengers.'" Moreover, United's Miami-North nonstop services are scheduled to connect with flights to and from points in the Southern Cone of South America, which generally depart late at night and arrive early in the morning?'

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<sup>3/</sup> American makes its usual argument (pp. 25-26) that after United acquired Pan American's Latin America Division in 1992, it chose not to invest in building a hub at Miami. In fact, United made a substantial investment to preserve a competitive U.S.-flag presence in virtually every Latin American market Pan American had served. The simple fact is that American had already established its presence at Miami through its acquisition of Eastern's Miami-Latin America hub, Order 90-4-11 at 9-10, by the time United acquired its Latin America authority from Pan American. With its hub already established, American was able to use its dominant position to add capacity in city pairs United sought to enter after its Pan American acquisition in order to drive United from those markets. As a result, United was forced to retrench in 1995 to reduce its losses, and American adjusted its capacity to better exploit the profit opportunity made possible by United's exit.

<sup>4/</sup> Source: 1997 CRS Booking Data. United offers nonstop service to Miami from Atlanta, Chicago, Denver, Los Angeles, Newark, New York, Orlando, San Francisco and Washington.

<sup>5/</sup> Prior to its termination of services, Pan American offered nonstop connections for its Miami-South America flights to only three of the same U.S. cities now served nonstop by  
(Cont'd on next page)

United would like to improve its connecting complex at Miami to become more competitive with American. Alliances with major Latin American carriers such as Lan Chile would be an important source of online traffic that could be used to support additional United services in Miami-North markets. It is to preclude United from using such alliances to add to competition in the Miami-Latin America market that American is forming pre-emptive alliances with major Latin American carriers such as Lan Chile as well as Aerolineas Argentinas, Avianca, Iberia, and all six carriers in the TACA Group.

Contrary to the claims of American and Lan Chile, there is a competitive alternative to their alliance which would give Lan Chile the access it needs to U.S. markets north of Miami. United could provide that access without compromising competition at Miami as the American/Lan Chile alliance will do. Disapproval of the American/Lan Chile alliance will not, in these circumstances, leave Lan Chile bereft of the opportunity to form meaningful, pro-competitive partnerships with U.S.

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United: New York, Orlando and Los Angeles. *Pan American System Timetable* (October 28, 1990). In addition, Pan American offered nonstop connections to Boston, Houston and New Orleans as well as commuter services to several points in Florida. The U.S. points with nonstop United connections at Miami account for more traffic to Chile than those that were served by Pan American.

carriers. Disapproval will, moreover, send a valuable message to other Latin American carriers that they must look beyond American, with its dominance at Miami, for U.S. partners to cooperate with them for services at that point.

4. Despite American's claims to the contrary, United is not opposed to American pursuing all of the legitimate benefits attendant to its hubbing operations at Miami. However, it does not follow that because American has a hub at Miami, while United does not, that American should be allowed to increase its dominant position at this strategic gateway through what amounts to an acquisition of one of its principal foreign-flag competitors in a key U.S.-Latin America air travel market, or to engage in other activities that substantially raise the costs of its actual or potential competitors in these markets.<sup>6/</sup>

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<sup>6/</sup> American's attempt to equate United's concern about the competitive effects of the American/Lan Chile alliance on the Miami-Santiago market with the effects of the United/Lufthansa alliance on competition in the Chicago-Frankfurt market is completely misplaced. Joint Reply at note 31. What American's comparison conveniently overlooks is that American has a hub at Chicago's O'Hare Airport and operates more international departures from O'Hare than United. Thus, whereas United is effectively forced to operate its Miami-Santiago service below minimum efficient scale (see United's initial Comment in this proceeding at 30-35), American faces no such limitation in competing with United or Lufthansa for local Chicago-Frankfurt passengers or in competing for connecting passengers traveling to or from Frankfurt and the numerous domestic and foreign points American serves behind Chicago.

Because of Miami's unique role as the pre-eminent gateway for intercontinental travel between North America and Central and South America, if American can successfully insulate its competitive position at Miami from challenge, it will be positioned to continue to dominate U.S.-Latin America air travel markets indefinitely. No carrier can hope to match the online network American already has in place at Miami. Through code sharing, however, United and other carriers have available a cost-efficient means to extend their route networks into Central and South American markets, and thereby to initiate broader intra-hub competition to American at Miami and more extensive network-to-network competition throughout Latin American.

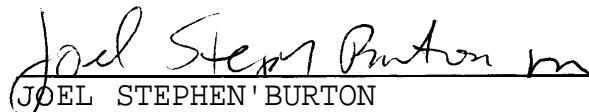
The record in this proceeding amply demonstrates that the only benefit American gains from an alliance with Lan Chile is the ability to forestall such competition and to retain its dominant position in the market. This is exactly the same motivation that led American to enter into its alliance agreement with the TACA Group of carriers and is behind its decision to invest in, and form alliances with, Aerolineas Argentinas, Avianca, Austral and Iberia. American's attempt to merge, rather than compete, with its only competitors that can provide the infrastructure for a second efficient U.S.-Latin

America network itself constitutes the ultimate "intervention" into the free market process.

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What is most striking about the Joint Reply American and Lan Chile have filed in this proceeding is the carriers' utter inability to provide any concrete evidence of substantial benefits that would accrue to the public from the Department's approval of their alliance. On the other hand, the anti-competitive consequences that would result from allowing American to enter into an alliance with Lan Chile are beyond dispute. These anti-competitive consequences so clearly overwhelm any theoretical consumer benefits the parties might claim for their alliance that the only action the Department can take that would be consistent with the public interest is to deny their Joint Application.

Respectfully submitted,


  
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Reply of United Air Lines, Inc. and Motion For Leave To File on all persons named on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.

  
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